

3100-9335-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE MINNESOTA DEPARTMENT OF VETERANS AFFAIRS

Thomas S. Wagner,

Petitioner,

v.

FINDING OF FACT,
CONCLUSIONS AND

RECOMMENDATION

Minneapolis Public Schools,

Respondent.

The above-captioned matter came on for hearing before Administrative Law Judge Jon L. Lunde commencing at 9:30 a.m. on Tuesday, February 7, 1995 at the Office of Administrative Hearings in Minneapolis, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated December 21, 1994. The record closed on March 13, 1995, when the deadline for filing responsive briefs expired.

Jesse Gant, III, Attorney at Law, Grain Exchange Building, 400 South Fourth Street, Suite 915, Minneapolis, Minnesota 55415, appeared on behalf of the Petitioner, Thomas S. Wagner, who was present at the hearing. J. Dennis O'Brien and Laura Tubbs Booth; Rider, Bennett, Egan & Arundel, Attorneys at Law, 2000 Metropolitan Centre, 333 South Seventh Street, Minneapolis, Minnesota 55402, appeared on behalf of the Minneapolis public schools, Special School District No. 1.

This Report is a recommendation, not a final decision. The Commissioner of the Minnesota Department of Veterans Affairs will make the final decision after review of the record and may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. s 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Mr. Gerald Bender, Veterans Preference Office, Department of Veterans Affairs, 20 West 12th Street, St. Paul, MN 55155-2079, telephone (612) 297-5828, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

The issues in this case are as follows:

1. Whether Petitioner was promoted from the position of assistant janitor engineer in charge of a grade school to assistant janitor engineer in charge of a secondary school prior to his suspension from employment;
2. Whether Petitioner was demoted from the promotional position; and
3. Whether the Petitioner is entitled to a Veterans Preference hearing on his alleged demotion and backpay at the higher promotional rate pending a hearing and decision on his demotion, suspension or discharge.

Based upon all of the proceedings herein, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner, Thomas S. Wagner, is a veteran. On July 26, 1976, after serving in the United States Army for three years, Petitioner was honorably discharged from active duty. Thereafter, he was in the inactive reserve for three years.
2. In March 1989, Respondent hired Petitioner as a janitor engineer. This was an entry-level janitorial position. In September 1992, Petitioner was promoted to the position of assistant janitor engineer in charge of a grade school. He worked at Webster Elementary School and was supervised by Thomas Hubbard.

3. On August 3, 1994, Petitioner applied for work as an assistant janitor engineer in charge of a secondary school, a promotional position. He successfully completed the promotional examination, and his name was placed on a candidate list for use in filling future vacancies in that position.

4. In the spring of 1994, two secondary school janitorial positions became available. Michael Meyer, manager of plant operations, submitted two promotional staffing requisitions to the Respondent's human resources department so those positions could be filled. The human resources department submitted the requisitions to the civil service commission. On May 6, 1994, the civil service commission provided Meyer with a list of four eligible candidates. They were: Thomas Winn, Benjamin Allenson, Colin Haviland, and Laurie Fischer. Both Winn and Allenson previously had been promoted to the position. Meyer notified the civil service commission of that fact and was informed that the only other eligible candidate on its list was Petitioner. At that time, therefore, there were three eligible candidates to fill the two vacant positions.

5. Meyer interviewed Haviland, Fischer, and Wagner for the positions. Wagner was interviewed on May 17. He was the last candidate interviewed. At the time of his interview, Haviland had already withdrawn himself from consideration for promotion. Therefore, at the time Wagner was interviewed, there were two eligible candidates for the two vacancies.

6. At the conclusion of Wagner's interview, Meyer notified him that he would be promoted and would assume his duties on May 31, 1994. Also, Meyer told Wagner that he probably would be assigned to work at Washburn High School.

7. On the morning of May 19, 1994, Petitioner was questioned by Webster School officials, including Meyer, regarding certain incidents involving school children and Petitioner. At the meeting, Petitioner admitted that he had allowed children to go unsupervised on to the roof of the school, that he had participated in a game of flashlight tag after school hours with a group of school children, and that he had periodically paid pupils to perform some of his job duties.

8. Following the meeting on May 19, 1994, Meyer notified Petitioner that he would be transferred to another school. Later that day, the human resources department determined that Petitioner should be suspended. Petitioner was suspended

at that time. Subsequently, in December, Petitioner was given notice of the Respondent's decision to terminate his employment for the acts discussed on May 19 and other alleged criminal conduct.

9. Upon learning of Petitioner's acts, Meyer decided not to promote Petitioner. Before a promotion takes effect, the appointing authority must notify the Respondent's human resources department that a candidate has been selected. The human resources department then notifies the Civil Service Commission of the appointment. Meyer never notified the human resources department that Petitioner had been promoted and the human resources department did not notify the Civil Service Commission. Records maintained by the Human Services Department contain the notation "NS" (i.e. "not selected") next to Petitioner's name on the candidate list. Ex. 4.

10. The parties stipulated to the following bi-weekly rates of pay:

At the position of Assistant Janitor Engineer in Charge of a Grade School:

| <u>FROM</u> | <u>TO</u> | <u>BI-WEEKLY RATE</u> |
|--------------|--------------|-----------------------|
| May 19, 1994 | July 1, 1994 | \$1,192.00 |
| July 1, 1994 | present | \$1,237.40 |

At the position of Assistant Janitor Engineer in Charge of a Secondary School:

| <u>FROM</u> | <u>TO</u> | <u>BI-WEEKLY RATE</u> |
|-------------------|-------------------|-----------------------|
| May 19, 1994 | July 1, 1994 | \$1,244.00 |
| July 1, 1994 | September 1, 1994 | \$1,265.96 |
| September 1, 1994 | present | \$1,289.66 |

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs are authorized to determine if Petitioner was promoted to the position of Assistant Janitor Engineer in Charge of a Secondary School and subsequently demoted and if Petitioner

is entitled to a veterans preference hearing and backpay under Minn. Stat. §§ 197.481 and 14.50 (1992).

2. Petitioner and Respondent received timely and proper notice of the hearing.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law

4. Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 (1992).

5. Respondent is a school district of the State of Minnesota for purposes of Minn. Stat. § 197.455 and 197.46 (1992).

6. The civil service provisions of the Minneapolis Home Rule Charter and other laws applicable to the City of Minneapolis apply to the Respondent's employees under Minn. Stat. § 128D.01, subd. 3 (1994)

7. Under section 15 of the Charter of the City of Minneapolis, an appointing authority must immediately notify the Civil Service Commission of any person employed and the compensation to be paid. All changes in grade, title, or compensation must be reported in a similar manner.

8. A promotional appointment is complete only when the last act required of the appointing authority has been performed.

9. An appointment may be rescinded at any time before it becomes final and complete.

10. Petitioner has the burden of proof to establish that he was promoted to the position of assistant janitor engineer in charge of a secondary school and later demoted from that position under Minn. Rules pt. 1400.7300, subp. 5 (1993).

11. At the time Petitioner was suspended from his employment for misconduct, his appointment to the position of assistant janitor engineer in charge of a secondary school was incomplete because the Respondent's human resources department and the Civil Service Commission had not been notified of the appointment.

12. Because Petitioner's appointment was incomplete at the time of his suspension on May 19, 1994, the appointment was revocable.

13. Petitioner is not entitled to a hearing under Minn. Stat. § 197.46 as a result of Respondent's appointing officer's decision not to complete the appointment process.

14. Petitioner was never effectively promoted to the secondary school janitorial position. Therefore, Petitioner, could not have been demoted from that position.

15. Petitioner's biweekly rate of pay following suspension should be based upon the rate for an assistant janitor engineer in charge of a grade school.

16. Because Petitioner wasn't demoted, he is not entitled to receive backpay or front pay based on the wages paid to assistant janitor engineers in charge of secondary schools.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED: That the Commissioner of Minnesota Department of Veterans Affairs DISMISS Petitioner's Petition.

Dated this April 11 , 1995

JON L. LUNDE
Administrative Law Judge

Reported: Transcript Prepared

NOTICE

Pursuant to Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

MEMORANDUM

Under Minn. Stat. § 197.46, "no person holding a position by appointment or employment in the several counties, cities, towns, school districts and all other political subdivisions in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing." Minn. Stat. § 197.46 (1992). Petitioner served in the United States Army for three years and was separated under honorable conditions. Therefore, Petitioner is a veteran within the meaning of Minn. Stat. §§ 197.46 and 197.447 (1994).

Petitioner argued that he was promoted to a secondary school janitorial position and subsequently demoted from that position. More specifically, Petitioner alleges he

was entitled to a hearing because he was demoted without a hearing in contravention of Minn. Stat. § 197.46 (1992) and that he is entitled to ongoing compensation at the promotional rate until a veterans preference hearing is held and a decision is made regarding the propriety of his demotion, suspension or discharge. As discussed below, Petitioner was not effectively promoted, thus he could not be demoted. Therefore, Petitioner's rate of pay is that of a grade school janitor and not that of the promotional position.

The general rule regarding the appointment of public officers and employees is set forth in 67 C.J.S. Officers, § 40, where it states in part:

The right to appointive office rests on a due and proper appointment.

There must be some open unequivocal act of appointment on the part of the appointing authority empowered to make it, and an appointment to office is made and is complete only when the last act required of the appointing authority has been performed.

An appointment can be revoked at any time before it becomes final and complete. 67 C.J.S., Officers § 43.

In State v. Essling, 128 N.W.2d 307 (Minn. 1964) the Minnesota Supreme Court addressed issues similar to those in this case. In its decision, the court held, among other things, that the power to rescind an appointment ceases when the power to appoint has been completely exercised. The court stated:

It appears well settled since Marbury v. Madison. . . that with respect to an office having a fixed term where the appointee is not removable at will, when the executive power of appointment has been completely exercised, the authority of the executive to remove or rescind the appointment ceases. This rule is founded upon the principle that where the appointing authority has done everything he is required to do to make a valid and complete appointment, he has fully exercised and exhausted his power over the appointee and a recall of the appointment would operate as a removal from office in violation of the appointee's right to continue in office subject only to rejection by the senate or removal for cause.

State v. Essling, 128 N.W.2d at 311. The Supreme Court went on to note that an appointment made by the Governor was not revocable because the governing statute required the Governor to appoint a person to the board, to issue him a commission, and to submit his name to the senate for confirmation. Because all these steps had been taken, the court held that the governor's appointment was complete when his nomination was submitted to the senate and was beyond the governor's pleasure to revoke or rescind.

Although Essling involved a gubernatorial appointment, the rule that an appointment is not final until the power of appointment has been fully exercised generally applies in the civil service context. See generally, 3 McQuillin, Municipal Corporations, § 12.86 (3d ed. 1990). See also, Molnar v. City of Aurora, 348 N.E.2d 262, 38 Ill App. 3d 580 (1976). Cf State v. Wadhams, 64 Minn. 318, 67 N.W. 64, 66-67 (1896).

The issue that must first be addressed is whether Meyer had complete exercised his appointment power with respect to Petitioner. Petitioner argued that Meyer effectively promoted him immediately after the interview on May 17, 1994 by telling Petitioner that he had the job. Respondent argues that the promotion was never finalized.

Meyer apparently was the "appointing officer" empowered to make janitorial appointments. Rule 16 of the Minneapolis Civil Service Commission Rules and Charter Provisions contains the following definitions:

"Appointing Officer is the person empowered by law or by delegated authority to make appointments to positions in the City service.

Appointment is the actual hire of an eligible into the classified service. Usually three persons are certified for a vacancy, but a City department interviews, selects, and appoints only one. The date on which employment with the City begins is the original appointment date."

Once an appointing officer has decided which of the candidates certified for appointment or promotion should be selected, the appointing officer must immediately

notify the civil service commission of the selection made. Neither Meyer nor the human resources department ever notified the civil service commission that Wagner had been appointed to the promotional position. On the contrary, documents filed with the civil service commission contained the letters "NS" next to Petitioner's name. The notation meant that Petitioner had not been selected for promotion. The Administrative Law Judge is persuaded that Wagner's promotion never became effective because notice of his appointment was never given to the civil service commission. Although Meyer told Petitioner the job was his, he never certified Petitioner's appointment as required by section 15 of the Charter of the City of Minneapolis and Rule 2.06 of the civil service commission's rules. Under these circumstances, it is concluded that Meyer's power of appointment was never fully or completely exercised. Therefore, Wagner was authorized to change his mind about Petitioner's promotion and reject Petitioner as a candidate.^[1]

At the hearing, Petitioner implied that the Certification Appointment Record indicating that he was not selected had been altered. However, Petitioner failed to present any evidence of an alteration. Meyer persuasively denied that any alteration occurred. Meyer testified that he reported to the human resources department that Petitioner had not been selected. There is no persuasive evidence rebutting that testimony.

Two days after Petitioner's interview, Petitioner admitted to senior school officials that he allowed school children to go unsupervised on the roof of the school, played flashlight tag with school children after regular school hours, and paid school children to perform some of his job duties. When Petitioner admitted that conduct, Meyer changed his mind about Petitioner's eligibility and rejected him as a candidate.^[2]

Respondent relies on the case, Ochocki v. Dakota County Sheriff's Department, 464 N.W.2d 496 (Minn. 1991). In Ochocki, the Minnesota Supreme Court held in that the county's revocation of a veteran's promotion did not trigger the protections of the Veterans Preference Act because the hiring process "violated the county's personnel administrative rules and procedures, and was seriously detrimental to all candidates." Ochocki, at 498. The promotion process, albeit flawed, was complete in Ochocki but here the process was never completed. However, Ochocki does, at least, stand for the

proposition that even after the power to promote has been completely exercised, an appointment can be revoked if there is not substantial compliance with governing laws and civil service rules. In this case, Meyer never certified Petitioner's promotion to the human resources department and the civil service commission as required by the city charter and civil service commission rules.

Petitioner suggested that since he was the only remaining candidate on the civil service commission's list of eligible appointees, he was either appointed or should have been appointed. The fact that the Petitioner was the last person on the civil service commission's list of certified eligible candidates does not constitute any guarantee that he would or should have been appointed. Under rule 8.08 of the civil service commission rules, an appointing authority may object to the certification of an eligible candidate on the grounds that the candidate is unsuitable. Furthermore, under rule 8.03C, when an eligible list contains less than three names the appointing authority may request the establishment of an additional eligible list so that there is a total of three names from which to make a selection.

In sum, it is concluded that Petitioner failed to establish that he was effectively promoted from the position of assistant janitor engineer in charge of a grade school to the position of assistant janitor engineer in charge of a secondary school. Since Petitioner was not promoted, he could not be demoted. Hence, he is not entitled to a hearing on his alleged demotion and is not to pay at the promotional level until his discharge appeal is resolved. At the time Petitioner was suspended, his title was assistant janitor engineer in charge of a grade school. His rate of pay should correspond to the rate paid to persons in that classification.

Following Petitioner's suspension and proposed discharge, Petitioner has been paid his usual salary as an assistant janitor engineer in charge of a grade school. He is not entitled to a higher salary payment under the Veterans Preference Act. Although Petitioner is not entitled to relief under the Veterans Preference Act, nothing prevents him from claiming in his discharge hearing that he is entitled to receive backpay lost as a result of Respondent's failure to promote him. If it is eventually concluded that the Respondent did not have good cause for Petitioner's suspension and ultimate proposal

to discharge him, he may well be entitled to receive backpay, but that will have to be decided in the discharge or suspension proceeding.

^[1] The issue in this case is whether Petitioner was, in fact, appointed and not whether Meyer had good or legal cause for changing his mind. Under the Veterans Preference Act, the Commissioner of Veterans Affairs has no authority to determine whether a veteran was properly denied a promotion. That issue must be decided in an appeal to the Civil Service Commission or in some other proceeding.

^[2] Rule 7.04, titled Expiration or Termination of Eligibility, of the Minneapolis Civil Service Commission Rules and Charter Provisions provides:

"An applicant may be removed from eligibility for any of the following reasons: ...

L. Any sufficient reason which would disqualify and eligible for appointment to the classification."